

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0524, James A. Davala & a. v. Town of Merrimack and its Board of Selectmen, the court on January 16, 2007, issued the following order:

The petitioners, James A. Davala & a., appeal the trial court's order denying their request for attorney's fees under RSA 275:53, III (1999) and dismissing the damages claims of four petitioners. We affirm.

The petitioners first argue that the trial court erred when it denied their request for attorney's fees under RSA 275:53, III. "We review a denial of attorney's fees with deference to the trial court's decision and we will not overturn that decision absent an unsustainable exercise of discretion." Jackson v. Morse, 152 N.H. 48, 54-55 (2005).

RSA 275:53, III provides that "[t]he court in any action brought under this subsection may, in addition to any judgment awarded to the plaintiff . . . allow costs of the action, and reasonable attorney's fees." We have previously interpreted this provision to require the trial court to award attorney's fees "when the court has found a wage claim meritorious, . . . unless the court further finds particular facts that would render such an award inequitable." Ives v. Manchester Subaru, Inc., 126 N.H. 796, 804 (1985).

We conclude that the trial court did not err when it denied the petitioners' request for attorney's fees. As the trial court aptly observed, the parties agreed to bypass the liability phase of the trial and proceed directly to the damages phase. The parties' stipulation contained no admission of liability on the part of the respondents. Under these circumstances, the trial court made no determination that the petitioners' claims were "meritorious." *Id.* We conclude, therefore, that the court acted within its discretion by denying the petitioners' claims for attorney's fees.

The petitioners next assert that the trial court erred by dismissing the damages claims of four petitioners. We disagree.

The parties stipulated that, at the damages phase of the trial, the court was only to determine: "The monetary amount, if any, necessary to bring the Petitioners' . . . pension benefits under any of the terminated Plans at issue to where they would have been had the Town not terminated the three pension plans at issue, and had the Town remained in those pension plans." The trial court found that the four petitioners whose claims it dismissed "voluntarily opted

out of their respective pension plans prior to the respondents' termination of such plans." The court further found that "[a]lthough there is evidence that the respondents discussed the possible illegality of such plans in 2003, the Court has been presented no persuasive evidence demonstrating that the respondents intended to terminate such plans prior to May 6, 2004." The court also found that there was no "evidence that these individual[s] . . . were told that the respondents were planning to terminate the plans." As the petitioners have not provided complete transcripts of the trial court's two-day evidentiary hearing, we must assume that the evidence supports these findings. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004).

Given the question that the court was asked to decide and the facts it found, we conclude that the court did not err when it found that the four petitioners "suffered no damages." Because these petitioners opted out of the pension plans at issue before they were terminated, even if the plans had not been terminated, these petitioners would not have been entitled to any additional sums.

Affirmed.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**